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IN THE

Supreme Court of the United States

October Term, 1966

No. 1098

PROHIBITION PARTY OF MICHIGAN, et al.,
Appellants,
vs.
JAMES M. HARE, SECRETARY OF STATE FOR MICHIGAN, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Michigan entered on October 21, 1966, granting leave to appeal to said Supreme Court prior to decision by the Michigan Court of Appeals, but therein also dismissing this case on the merits. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal, and further, that substantial questions under the U. S. Constitution of the right of franchise and the rights of third parties in our political system are presented to interest this Court in a thorough consideration of this subject at this time in history.

OPINION BELOW

Other than the summary order of October 21, 1966 from the Michigan Supreme Court, attached hereto as Appendix A, no opinion was issued by the Michigan Supreme Court. Other than the summary order of October 19, 1966 from the Michigan Court of Appeals, an inferior tribunal to the Michigan Supreme Court, a copy of which is attached hereto as Appendix B, no opinion was issued by said Court of Appeals. For purposes of record clarification, it appears the Michigan Supreme Court assumed jurisdiction without knowing the Court of Appeals had made a decision a few days previously, but this fact is of no consequence to Appellants' position.

JURISDICTION

This suit was brought as an original action in the Michigan Court of Appeals seeking a ruling that Michigan Statute Annotated 6.1685 (providing petition signature requirements for political parties and their candidates to be printed on official State election ballots) was unconstitutional under the State and the U. S. Constitution, 14th Amendment. Judgment dismissing the cause was entered on October 19, 1966. Thereafter, the Michigan Supreme Court reviewed the case, purportedly prior to a decision by the Court of Appeals, and by judgment dismissed the cause on October 21, 1966. Notice of Appeal to the U. S. Supreme Court was filed in the Michigan Supreme Court on January 4, 1967.

The jurisdiction of the U. S. Supreme Court to review the decision of the Michigan Supreme Court by direct appeal is conferred by Title 28, United States Code, Section

1257 (2). The following decision and others cited later sustain the jurisdiction of the U. S. Supreme Court to review the judgment on direct appeal. Most recently, this Court has considered a similar state statute on appeal in *MacDougall v. Green*, 335 U. S. 281 (1948).

QUESTION PRESENTED

Where a state statute requires, as a condition for the Prohibition Party to be officially printed on general election ballots, that such a party, if previously printed on the ballot, attain a vote of 1% of the votes cast for Secretary of State at the preceding election, or, if not previously printed on the ballot, obtain by circulation of petitions in a prescribed manner, written signatures equal to at least 1% of the votes cast for Secretary of State at the last election, do these and other technical requirements of the statute in question violate the Fourteenth Amendment of the U. S. Constitution "privilege and immunity", "equal protection" or "due process" clauses as being unreasonably burdensome in effect on members of the Prohibition Party of Michigan, preventing their Party from being printed on the official ballot, after a history of being on such ballot from 1876-1960, and further preventing individual Party candidates from being printed on such ballot to be given a fair opportunity to compete for the votes of the American public against other candidates of other parties whose names were officially printed to be so viewed by voters on election day?

STATUTES INVOLVED

Michigan Statutes Annotated 6.1685 being Michigan Public Acts 1961, No. 223 as set forth in Appendix C hereto. Michigan Statutes Annotated 6.1737 (4) being Michigan Compiled Laws of 1948, Sect. 168.737.

STATEMENT

A. Raising of Constitutional Questions.

The attack on Fourteenth Amendment grounds upon MSA 6.1685 was first raised in the Plaintiff's original Complaint for Mandamus, Superintending Control and Injunctive relief, filed originally in the State Court of Appeals and then considered as an original matter by the Michigan Supreme Court. This U. S. constitutional question was further raised and argued in Plaintiff's Short Brief to Support Application for Leave to Appeal to the Michigan Supreme Court Prior to Decision by the Court of Appeals, paragraphs I (A), III, IV, V (2), and in such Application (paragraph 2), both a part of the certified record in this case. No oral argument or further briefs were presented or requested. As related above, there were no opinions written in either the Court of Appeals or the Michigan Supreme Court, and thus, the constitutional questions were disposed of summarily in the judgments of dismissal attached respectively as Appendix A and B hereto.

B. Facts.

1. Introduction

Plaintiff Prohibition Party of Michigan is an unincorporated association of individuals banded together for the purposes of making effective in the political market-place the platform of the national Prohibition Party (sometimes named Christian Prohibition Party), which 26 Plank Comprehensive Platform is set forth as Attachment #B to the Complaint in this action. The executive headquarters of the national Party is in Michigan and its Executive Director, Dr. D. D. Gibbons, is a Plaintiff in this suit. Unfortunately perhaps for its contemporary public image, the name "Prohibition Party" is somewhat misleading, having historical derivations, in that it communicates today a narrowness of political concern, whereas in fact 25 of the 26 Platform Planks deal with political concerns other than alcohol and cover all the concerns of the major two political parties.

2. History

Since this cause, at bedrock, involves the right to continued political life of a minority third party and its adherents, which Party has long existed and has long made contributions to the American political market place, it may be helpful to refer to history. The Prohibition Party dates formally from at least 1869. As examples of contributions, it claims to have declared publicly for the following programs before either of the two current major parties: universal suffrage (1872); direct election of U. S. Senators (1872); the income tax (1896); child labor laws (1908); employers liability acts (1908); old age pensions (1916); unemployment insurance (1916).

3. Michigan History

Further, the Prohibition Party has qualified to be on every Michigan presidential election year ballot from 1872 up to and including 1960. Effective September 8, 1961, the predecessor statute to the current MSA 6.1685 at bar was changed by the two majority parties which totally constituted the Michigan Legislature to require a notarized affidavit on party nominating petitions and further to require separate petition sheets for separate cities and townships. Because of such unreasonably burdensome new requirements, due allegedly to anti-third party legislative sentiment, the Prohibition Party failed to qualify for printing on the 1962 general election ballot, having obtained only 9,800 signatures out of the statutory requirement of 17,538, based on a formula of 1% of the votes cast for the successful Secretary of State at the preceding election. Again, in 1964, the Prohibition Party failed to obtain the required number of 14,896 signatures, falling just short with a total of 12,000 signatures. In the 1966 election, the Prohibition Party obtained about 12,000 signatures before giving up hope of obtaining the required number of 19,336, based again on the same 1% formula.

Individual Plaintiffs are members of the Prohibition Party of Michigan, desire to vote for such Party on a printed ballot, and further desire to run for office as nominated by their Party, respectively as U. S. Senator (E. H. Munn) and Secretary of State (Dr. D. D. Gibbons), and to be printed on the ballot for equal access to the voters.

Having failed to comply with the requirements of MSA 6.1685, so to secure party printing on the official 1966 Michigan election ballot, Plaintiff Prohibition Party of Michigan, nevertheless, in regular course, went ahead and held its fall convention as did other major political parties and forwarded to the Director of Elections, who works for

Defendant Secretary of State, a list of the Party's nominees for major offices, including U. S. Senator, Governor, Lt. Governor, Secretary of State, etc., plus a copy of the Party vignette and requested certification and printing on the official ballot of the Party vignette and said slate of candidates. By letter of August 30, 1966, attached to the Complaint as Attachment A, the Director of Elections refused to certify the Party or its candidate nominees on the basis of statutory non-compliance (MSA 6.1685), which non-compliance Appellants admit to.

4. Nature of Litigation

On September 16, 1966, Plaintiffs filed their Complaint as an original action in the Michigan Court of Appeals and pursuant to Michigan court rules, filed concurrently an Application for Leave to Appeal to the Michigan Supreme Court Prior to Decision by Court of Appeals, along with Plaintiffs' Short Brief to Support Application for Leave to Appeal to the Michigan Supreme Court Prior to Decision by the Court of Appeals. Such Brief claimed that MSA 6.1685 was unreasonably burdensome as applied to minority third parties and namely the Prohibition Party, in violation of the "privileges and immunities", the "due process" and the "equal protection" clauses of the Fourteenth Amendment to the U. S. Constitution.

Such violations specifically were alleged to be the unreasonably large number of signatures required (if signatures should be required at all for ballot access in a free society), since the number arbitrarily depended each election year on how many votes the winning candidate for Secretary of State got at the last election, which figure did historically rise or fall substantially with the popularity of such candidate; since minority parties lacking statewide

county organizations are not well-equipped to manage the tedious, perfunctory, but expensive work of petition signatures; since the signatures must be gathered and filed 6 months prior to the election, thus burdening all parties in facing a low level of interest in the populous; and finally, since the *Model Election Law* of the American Civil Liberties Union recommends that the appropriate formula require only 1/10 of one percent of the vote cast in the preceding gubernatorial election with a maximum requirement of 10,000 signatures, which requirement the Prohibition Party could have met in 1966 and previous years. Defendants' position throughout the litigation was of course that MSA 6.1685 was reasonable State regulation of the franchise.

Besides the unreasonably burdensome number requirements and associated minority party handicaps, the Brief attacked MSA 6.1685 for setting unreasonably burdensome forms to such petitions e.g. that petitions must be signed by at least 100 persons from 10 separate counties in the state (as if one signature was not equal to another), and that no more than 35% of the signatures be from one county, and that signers declare their "intent to organize" the Party, etc. and not merely the interest to help a competitive Party to get on the ballot.

C. Disposition by State Courts.

After filing the original Complaint in the Court of Appeals, which Complaint asked for an order directing Defendants to print the Prohibition Party and its candidates on the official ballot, Plaintiffs moved in the Court of Appeals for Immediate Consideration on September 27, 1966, and thereafter on September 28, 1966 in response to Defendants' Answer, filed in the Michigan Supreme Court a Reply to Answer to Plaintiffs' Application for Leave to Appeal to the Michigan Supreme Court Prior to

Decision by the Court of Appeals. Defendants filed an Answer and Brief in opposition to Plaintiffs' Application for Leave to Appeal in the Supreme Court, and an Answer in the Court of Appeals. All such documents are a part of the record in this case. On October 19, 1966 the Court of Appeals dismissed the Complaint without opinion and on October 21, 1966 the Michigan Supreme Court granted leave to appeal and concurrently dismissed the Complaint on its own motion and without opinion. On January 4, 1967 Plaintiffs filed Notice of Appeal to the Supreme Court of the United States.

THE QUESTIONS ARE SUBSTANTIAL

This Court's *Reynolds v. Sims*, 377 U. S. 533, and other "one-man, one-vote" decisions were cited below and are mentioned here, along with *MacDougall v. Green*, 335 U. S. 281 (1948), to buttress the claim of this Court's jurisdiction, as well as to introduce the important constitutional question of franchise rights at stake. The *MacDougall* case involved attack on a state statute similar to the one at bar, where the Court was forced by the pressures of time to make a fast decision in sustaining the statute, over vigorous dissent by Justices Douglas, Black and Murphy, and with one other judge concurring with the majority only because he felt time was too short for the Court to properly exercise equity jurisdiction. In candor, it is counsel's humble opinion that the key practical question facing the Court in this Jurisdictional Statement is whether this Court wants to re-examine, without the rush of time pressure, *MacDougall*, in view of the Court's recent strong concern in other areas of the franchise, and in view of the overriding fact in this case that what was once a major political party in our country and which still offers a comprehensive program on political issues is disappearing be-

cause of State ballot laws passed by the major parties, and in view of the overriding question of whether the Prohibition Party and other third parties should be allowed more free access to the printed official ballot under the Constitution than allowed by MSA 6.1685 (and similar statutes in other states).

Even the Socialist Labor Party, which narrowly qualified for a place on the 1966 Michigan printed ballot, as the only other party besides the two major parties, has requested and is preparing to file an *amicus* brief in this case, protesting the financial and personnel burden it must bear as a minor third party in complying each election year with the Statute, a burden which dilutes the time all third parties can give to the essential contribution of third parties in our free society—contributing and publicizing competing ideas and programs for the public to consider and vote for or against. As was said by Richard Hofstadter in *The Age of Reform* pp. 98-99:

> "But third party leaders in the United States must look for success in terms different from those that apply to the major parties, for in those terms third parties always fail . . . Their function has not been to win or govern, but to agitate, educate, generate new ideas, and supply the dynamic element in our political life . . ."

MacDougall has been judicially ignored and used in dissenting opinions of this Court since 1948, but it has not been overruled specifically or by implication in a case with similar facts. The majority in *Baker v. Carr*, 368 U. S. 251 at p. 254 minimizes *MacDougall* by saying, "*MacDougall v. Green*, 335 U. S. 281 held only that in that case equity would not act to void a State's requirement . . ." In the same case, *MacDougall* is used in dissenting and concurring opinions, as it was later in *Gray v. Sanders*, 372 U. S. 383, and again in *Lucas v. Colorado General Assembly*, 377 U. S. 713.

As a point in passing, one would think that if this Court were to show the concern in the minority party area of our politics as it has in the legislature apportionment area, and were to sanction a formula similar to that recommended by the American Civil Liberties Union, there would be less judicial-administrative problems flowing therefrom than have come from the legislative apportionment decisions.

This Court has long carefully protected the right which is so basic to our system of government, the right of franchise, from state laws which arbitrarily and unreasonably discriminate against citizens in the exercise of the right to vote. *Nixon v. Herndon*, 273 U. S. 536; *Smith v. Allright*, 321 U. S. 649; and, more recently, *Baker v. Carr*, 369 U. S. 251 and other "one-man, one-vote" decisions.

Some of the discrimination involved in this whole issue of ballot access for minority parties concerns the perhaps subtle discrimination of making financial fund raising an element of political success. This element cannot be minimized or relegated to a mere "political" matter since it affects constitutional rights in a very direct sense and the legislative branches, dominated as they are by the major parties, are not likely to make this financial factor less a burden to minority parties, even if they are capable of some reform at all. Indeed, as future briefing in this case will reveal more extensively, the aura of elections being "bought" has very much been present in Michigan and elsewhere. As one of the Defendants in this case, JAMES M. HARE, said in the August 9, 1966 *Detroit News* in the context of a U. S. Senate election where one man spent $190,000 of his own money and total *primary* expenses for the two candidates in one party were over $700,000:

> "No real expense limit therefore exists (because of the legal statutory avoidance of forming separate

committees). Thus, with the escalating cost of campaigning, the real danger exists that public offices will be open only to the independently wealthy or to those indebted to interest groups who furnished the campaign money."

For reasons cited above and others, MSA 6.1685 discriminates in its practical operation against Plaintiff Prohibition Party since it requires unreasonably burdensome achievements not reasonably related to any state concern except the intolerable concern to avoid the administrative work and some additional printing expense of having third parties. Such signature procurement is not only unreasonably burdensome to a minority third party in the volume it requires and the form it demands, but there is great expense involved as well, and it is common knowledge in the State that the two major parties pay workers to perform such perfunctory tasks for individual candidates, a financial burden the Prohibition Party cannot afford nor justify otherwise. Also, the requirements of 100 signatures from 10 counties and no more than 35% of the signatures from one county cannot be justified under the "one-man, one-vote" rule of law recognized by this Court, considering too that the Prohibition Party does not have an organization in all counties of the State, but tends to organize through area camp-meetings.

It is submitted that the provision for write-in votes in MSA 6.1737 (4) does not offer, in practicality, the equal ballot access which Plaintiffs seek in this suit for such method is too cumbersome, does not give the Prohibition Party equal visual exposure and in practice has resulted in some cases of votes not being certified. Such statute also has a glaring internal contradiction argued in Appellant's Reply to Answer.

The question is whether persons such as individual Plaintiffs can effect their political concerns through minority parties having equal and fair access to the competition for votes on the printed ballot or whether our *Constitution* as applied to the Michigan statute allows only three political parties, as long as the Socialist Labor Party can barely meet the statutory requirements, and thereafter only two. For if this statute remains, and others like it in other states, the Prohibition Party and its broad 26 Plank Platform will surely disappear from the political market place after being there in a constructive role for nearly 100 years. The substantial question in this case involves the constitutional rights of minority third parties in our society to fair ballot *access*, not success, as opposed to a political market place dominated entirely by a monopoly of two political parties, whose differences are not always easily discernible and whose current likenesses raise threats to the competition of political ideas in the opinion of many experts. A subject so substantial, it is submitted, deserves the plenary consideration of this Honorable Court after briefs and oral argument, and Plaintiffs pray too for a written opinion on the issues involved, a right or privilege which neither lower court has granted and which would be greatly appreciated by Appellants who seek redress of grievances.

Respectfully submitted,

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By _____
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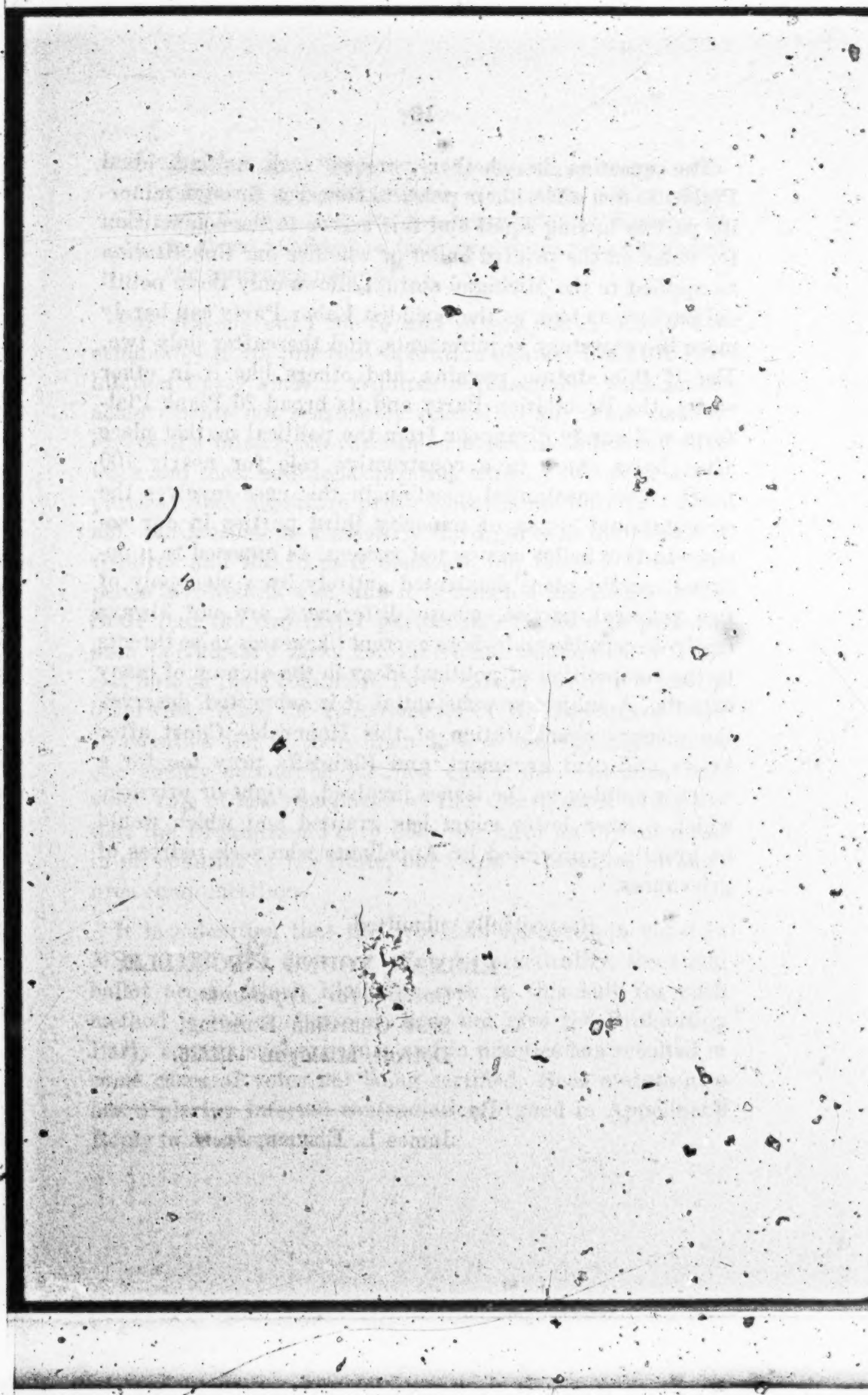

APPENDIX "A"

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 21st day of October in the year of our Lord one thousand nine hundred and sixty-six.

Present the Honorable Thomas M. Kavanagh, Chief Justice, John R. Dethmers, Harry F. Kelly, Eugene F. Black, Theodore Souris, Otis M. Smith, Michael D. O'Hara, Paul L. Adams, Associate Justices.

On order of the Court, the application for leave to appeal prior to decision by the Court of Appeals is considered, and the same is Granted. The said cause is thereupon dismissed by this Court, on its own motion, under GCR 1963, 852.2(8), for the reason that a meriterious basis is not shown.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Mihcigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 21st day of October in the year of our Lord one thousand nine hundred and sixty-six.

/s/ Donald F. Winters
Clerk.

(Seal)

APPENDIX "B"

At a Session of the Court of Appeals of the State of Michigan, Held at the Court of Appeals in the City of Lansing, on the 19th day of October in the year of our Lord one thousand nine hundred and sixty-six.

Present the Honorable Louis D. McGregor, Presiding Judge, Thomas Giles Kavanagh, Timothy C. Quinn Judges.

In this cause a complaint for mandamus, superintending control, and injunctive order, motion for order to show cause, and brief in support of application for leave to appeal to the Michigan Supreme Court prior to decision by this Court is filed by plaintiffs, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

It is Ordered that said complaint for mandamus, superintending control, injunctive order, and order to show cause shall be and the same is hereby Denied.

State of Michigan—ss.

I, Ronald Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 24th day of October in the year of our Lord one thousand nine hundred and sixty-six.

/s/ Ronald L. Dzierbicki,
Clerk.

(Seal)

APPENDIX "C"—Statutes

MSA 6.1685, P.A. 1961, No. 223, reads as follows:

"Qualifying of new party for place on ballot; petition, signatures, form; disqualification and requalification of parties. Sec. 685. The name of no candidate of a new political party shall be printed upon the official ballots of any election unless the chairman and secretary of the state central commitee of the party shall have filed with the secretary of state, at least 6 months prior to such election, a certificate signed by them bearing the name of the party, and unless accompanying the certificate there shall have been filed petitions bearing the signatures of registered and qualified electors equal to not less than 1% nor more than 4% of the number of votes the successful candidate for secretary of state received at the last election in which a secretary of state was elected. The petitions shall be signed by at least 100 residents in each of at least 10 counties of the state and not more than 35% of the minimum required number of the signatures may be by resident electors of any one county. All signatures appearing upon the petitions shall have been obtained within a period of 6 months immediately preceding the date of filing. The validity and authenticity of the signatures may be determined in the same manner as provided for initiatory and referendary petitions in section 9 of article 2 of the state constitution. The petitions shall be in substantially the following form:

PETITION TO FORM NEW POLITICAL PARTY

We, the undersigned, duly registered electors of the city, township (strike one) of ....., county of ....., state of Michigan, residing at the places set opposite our names, hereby declare our intention to organize the ..... party, and respectfully request the secretary of state, in accordance with section 685, Act No. 116, Public Acts of 1954, as amended, to receive the certificate and vignette of our party, tendered herewith, for filing, and place the names of our candidates on the ballot at the ..... election.

Warning: Whoever knowingly signs petitions to organize more than one new state political party, signs a petition to organize a new state political party more than once or signs a name other than his own, is violating the provisions of the Michigan election law.

.....

.....

.....

The size of all organizing petitions shall be 8½ inches by 13 inches and shall be printed in the following type sizes: The words "petition to form a new political party" and the name of the proposed political party shall be in 24-point bold face type; the word "warning" and the language contained therein shall be in 12-point bold face type.

No political party, the principal candidate of which shall have received a vote equal to less than 1% of the total number of votes cast for the successful candidate for the office of secretary of state at the last preceding election in which a secretary of state was elected shall have the name of any candidate printed on the

ballots at the next ensuing election, nor shall a column be provided on the ballots for such party. Any party so disqualified may again qualify and have the names of its candidates printed in a separate party column on each election ballot in the manner set forth in the first paragraph of this section for the qualification of new parties. The term "principal candidate" of any party shall be construed to mean the candidate whose name, shall appear nearest the top of the party column."

• • • • •

MSA 6.1737 (4), being Michigan Compiled Laws of 1948, Sect. 168.737, provides:

"If the elector wishes to vote for a candidate not on any ticket, he may write or place the name of such candidate on his ticket opposite the name of the office and make a cross (X) in the circle under the party name."

• • • • •